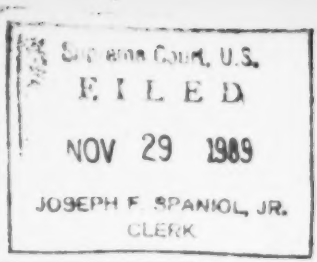
89-883



NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

TECHNOLOGY FOR ENERGY CORPORATION,*

PETITIONER,

V.

SCANDPOWER, A/S; SCANDPOWER, INC.,

DEFENDANTS,

RADCAL ENGINEERING, INC.;
FLUID COMPONENTS, INC.; ROBERT D. SMITH;
JAMES P. WARING; MALCOLM M. MCQUEEN;
AND ROBERT A. DEANE,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JAMES S. TIPTON, JR.
Counsel of Record

GENTRY, TIPTON, KIZER & LITTLE, P.C.
P.O. Box 1275
Knoxville, Tennessee 37901
(615) 525-5300
Attorneys for Petitioner

*Petitioner has no parent, no subsidiary, and no affiliate.

QUESTION PRESENTED:

Did the United States Court of Appeals for the Sixth Circuit err in applying a "but for" standard of proximate causation to petitioner's claim of interference with prospective economic advantage under California law, when the Court found that the respondents' wrongful actions constituted one of two concurring causes, either of which, standing alone, would have caused the petitioner's loss?

TABLE OF CONTENTS

QUESTION PRESENTED.....I

TABLE OF CONTENTS.....II

TABLE OF AUTHORITIES.....III

OPINIONS BELOW.....2

JURISDICTION.....2

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED.....3

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING THE WRIT.....6

ARGUMENT.....9

CONCLUSION.....32

APPENDIX

Opinion of the United States Court of Appeals for the Sixth Circuit, filed July 26, 1989.....1a

Memorandum Opinion of the United States District Court for the Eastern District of Tennessee, Northern Division, filed June 1, 1988.....15a

Order of the United States District Court for the Eastern District of Tennessee, Northern Division filed June 1, 1988.....53a

APPENDIX (Continued)

Order of the United States
District Court for the
Eastern District of
Tennessee, Northern Division
filed June 17, 1988.....55a

Judgment of the United States
Court of Appeals for the Sixth
Circuit, filed July 26, 1989.....57a

Order of the United States
Court of Appeals for the Sixth
Circuit, denying rehearing,
filed August 31, 1988.....59a

TABLES OF CASES AND OTHER AUTHORITIES

CASES

Augustine v. Trucco,
124 Cal. App. 2d 229,
268 P.2d 780 (1954).....25, 26, 27

Baillargeon v. Myers,
180 Cal. 504, 182 P. 37 (1919)....16

Blank v. Kirwan,
39 Cal. 3d 311, 216 Cal. Rptr.
718, 703 P.2d 58 (1985).....31

Boeing Airplane Company v. Brown,
291 F.2d 310, 317 (1961).....7

Campbell v. Rayburn,
129 Cal. App. 2d 232,
276 P.2d 671 (1954).....32

Dryden v. Tri-Valley Growers,
65 Cal. App. 3d 990, 135
Cal. Rptr. 720 (1977).....25, 26, 27

Flournoy v. State of California,
275 Cal. App. 2d 806, 80 Cal.
Rptr. 485 (1969).....21

McDonald v. Schwartz,
239 Cal. App. 2d 806, 80
Cal. Rptr. 242 (1966).....19

McGee v. Cessna Aircraft Co.,
139 Cal. App. 3d 179, 188
Cal. Rptr. 542 (1983).....19

Tate v. Canonica,
180 Cal. App. 2d 898, 5 Cal.
Rptr. 28 (1968).....22

Thomsen v. Rexall Drug & Chemical Co.,
235 Cal. App. 2d 775, 45 Cal.
Rptr. 1965.....17, 19, 20, 21, 22,
23, 24, 26, 27, 29, 32

Valdez v. J. D. Diffenbaugh Co.,
51 Cal. App. 3d 494, 124
Cal. Rptr. 467 (1975).....21, 26

Vecchione v. Carlin,
111 Cal. App. 3d 351, 168
Cal. Rptr. 571, 575-76
(1980.....12, 13, 19, 20, 21
22, 23, 26, 27, 29, 32

Youst v. Longo,
43 Cal. 3d 64, 233 Cal.
Rptr. 294, 729 P.2d 728
(1987).....13, 14, 15, 24
25, 27, 28, 29, 30

OTHER AUTHORITIES

Prosser, "Proximate Cause in California," 38 California Law Review (1950).....16, 17, 18

Prosser & Keeton, Law of Torts (5th ed., 1988).....22

Restatement (Second) of Torts (1979), §768.....8

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. _____

TECHNOLOGY FOR ENERGY CORPORATION,

PETITIONER,

V.

SCANDPOWER, A/S; SCANDPOWER, INC.,

DEFENDANTS,

RADCAL ENGINEERING, INC.;
FLUID COMPONENTS, INC.; ROBERT D. SMITH;
JAMES P. WARING; MALCOLM M. MCQUEEN;
AND ROBERT A. DEANE,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Technology for Energy respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 26, 1989, and the order entered on August 31, 1989, denying the petitioner's petition for rehearing.

OPINIONS BELOW

By Opinion and Judgment filed on July 26, 1989, the United States Court of Appeals for the Sixth Circuit affirmed a District Court judgment against the plaintiff petitioner. (App. 1a, 57a). The opinion of the Court of Appeals is published: Technology for Energy Corporation v. Scandpower, A/S, 880 F.2d 875 (6th Cir. 1989). (App. 1a). By order entered August 31, 1989, the Court of Appeals denied petitioner's petition for rehearing. (App. 59a).

JURISDICTION

(1) The United States Court of Appeals for the Sixth Circuit, on July 26, 1989, filed a Judgment (App. 57a) of that date, which was final by its terms, affirming a District Court judgment against plaintiff petitioner.

(2) By order dated and entered August 31, 1989 (App. 59a), the United States Court of Appeals for the Sixth Circuit denied plaintiff petitioner's petition for rehearing.

(3) The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

None. The question of substantive law is governed by case authority applying California law regarding the tort of interference with prospective economic advantage.

STATEMENT OF THE CASE

Petitioner's action in the United States District Court for the Eastern District of Tennessee, against defendants Scandpower A/S and Scandpower, Inc. (with

whom TEC eventually settled) and the respondents, was based on diversity of citizenship under 28 U.S.C. Section 1332. The action included a claim against respondents for interfering with TEC's prospective economic advantage under California law. Specifically, the District Court found that TEC had virtually consummated a contract with Sacramento Municipal Utility District ("SMUD"), lacking only perfunctory approval by the SMUD board, for the installation of a safety related nuclear reactor monitoring system based on patented technology known as RADCAL, licensed to TEC by Scandpower.

The District Court also found that on the very day the SMUD board approval was scheduled, respondents told SMUD officials that TEC (1) had no rights to RADCAL, which statement the District

Court found to be false, and (2) that TEC was in dire financial straits, which the District Court found to be true. The District Court found that either the false statement or the true statement, standing alone, would have caused TEC the loss of the SMUD contract.

The District Court dismissed the claim, however, holding that the false statement could not be a proximate cause of TEC's loss, because TEC's failure to provide proof of its RADCAL rights was an intervening cause, and the true statement, even if it caused the loss, was privileged.

TEC appealed to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals held that the District Court erred in its analysis of intervening causation, and that TEC's failure to provide documentation of its

RADCAL rights could not be an intervening cause, because SMUD's request for the documentation was prompted by respondents' false statements. Without disturbing the District Court's findings that either the false statement about TEC's RADCAL rights, or the true statement about TEC's financial condition, standing alone, would have caused TEC to lose the SMUD contract, the Court of Appeals nevertheless affirmed the District Court's dismissal of TEC's claim, on a new and different basis.

The Court of Appeals held that under California law a claim for intentional interference required TEC to prove that it would have obtained the SMUD contract "but for" respondents' wrongful behavior.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY APPLIED A "BUT FOR"

STANDARD OF PROXIMATE CAUSATION TO THE TORT OF INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE UNDER CALIFORNIA LAW. THE DECISION OF THE COURT OF APPEALS IS IN CLEAR CONFLICT WITH WELL ESTABLISHED CALIFORNIA LAW OF PROXIMATE CAUSATION APPLIED BY CALIFORNIA STATE COURTS (INCLUDING DECISIONS OF THE CALIFORNIA SUPREME COURT, INCLUDED IN THE ARGUMENT BELOW). ALSO, ALTHOUGH THERE IS NO DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT WHICH IS DIRECTLY IN POINT, THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IN THIS CASE IS DIRECTLY CONTRARY TO THE PRINCIPLES OF "CONCURRENT CAUSATION" UNDER CALIFORNIA LAW, IMPLICITLY RECOGNIZED BY THE NINTH CIRCUIT IN BOEING AIRPLANE COMPANY V. BROWN, 291 F.2d 310, 317 (1961). FINALLY, THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IN THIS

CASE SO FAR DEPARTS FROM THE COURT'S DUTY TO APPLY CLEAR AND SETTLED PRECEDENT AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION. THE TORT OF PROSPECTIVE ECONOMIC ADVANTAGE IS AT A CRITICAL STAGE IN ITS EVOLUTION, AND IN THE NATION'S MODERN COMMERCIAL MARKET, WITH MULTI-STATE DEALINGS THE RULE RATHER THAN THE EXCEPTION, IT IS CRITICAL THAT THE FEDERAL CIRCUIT COURTS PROPERLY UNDERSTAND AND APPLY THE LEGAL PRINCIPLES ON WHICH THE TORT IS BASED. BECAUSE CALIFORNIA LAW MERELY ADOPTS THE ELEMENTS OF THE TORT SET FORTH IN THE RESTATEMENT OF THE LAW OF TORTS, THE SIXTH CIRCUIT'S MISAPPREHENSION OF THE "BUT FOR" THRESHOLD ELEMENT OF CAUSATION INHERENT IN THE TORT HAS BROAD SIGNIFICANCE.

THE ERROR IN THE DECISION OF THE COURT OF APPEALS IS FUNDAMENTALLY SIMPLE. UNDER CALIFORNIA LAW, THE "BUT FOR" TEST

OF PROXIMATE CAUSATION IS NEVER APPLIED TO EXONERATE A WRONGDOER WHEN HIS WRONGFUL ACT AND ANOTHER CAUSE HAVE CONCURRED TO PRODUCE A LOSS, EVEN THOUGH THE OTHER CAUSE, STANDING ALONE, WOULD HAVE PRODUCED THE LOSS. BY MISAPPREHENDING THE "BUT FOR" THRESHOLD REQUIREMENT OF CAUSATION INCLUDED AS AN ELEMENT IN PROVING INTERFERENCE WITH PROSPECTIVE ADVANTAGE UNDER CALIFORNIA LAW, AND IN IGNORING THE CLEAR "CONCURRING CAUSE" EXCEPTION UNDER CALIFORNIA LAW OF PROXIMATE CAUSATION, THE COURT HAS SEVERELY AND UNWISELY RESTRICTED THE SCOPE OF THE TORT.

ARGUMENT

Petitioner believes that the need for exercise of this Court's review is best demonstrated by the clear and fundamental

nature of the misapplication of the law by the Court of Appeals.

Under a clear exception to the general "but for" rule of proximate causation in California tort law, where a wrongful act and another cause concur to produce a loss, and either, standing alone, would have produced the identical loss, the "but for" test does not apply, and the wrongdoer is liable, despite the fact that the same loss would have occurred without his wrongful act.

TEC alleged that the respondents intentionally interfered with TEC's prospective economic advantage by causing SMUD not to award TEC a $5,000,000.00 contract.

SMUD was ready to award a contract to TEC at its March 7, 1985 board meeting, but on that very day, as the District Court found, respondents "represented to

SMUD that TEC was in dire financial straits and that TEC had no rights to RADCAL technology." (App. 5a).

The District Court found that the representation regarding TEC's financial condition was true and the representation regarding TEC's right to use RADCAL was false, and that either representation, "standing alone", would have caused SMUD to reject TEC's bid. (App. 6a).

Significantly, on these findings by the District Court, factual causation is established, and the sole issue as to proximate cause is a legal issue, involving the proper California law to apply to the factual findings.

The Court of Appeals accepted respondents' argument that a "but for" proximate causation test should apply. Applying the "but for" test, the Court of Appeals noted that because "the truthful,

privileged disclosures about TEC's dire financial condition alone would have caused SMUD to reject TEC's bid," TEC failed to prove that "it would have obtained the economic advantage 'but for' the defendants' tortious interference." (App. 13a).

TEC contends that the "but for" test simply does not apply.

The Court of Appeals, by reference to Vecchione v. Carlin, 111 Cal. App. 3d 351, 358-59, 168 Cal. Rptr. 571, 575-76 (1980), appears to recognize that California has rejected the "but for" test of proximate causation in situations in which a loss is produced by two concurring causes, either of which, standing alone, would have caused the loss. The holding in Vecchione represents a well established exception to the "but for" test of proximate causation in California, and its

application to this case is compelled by the District Court's finding that either the true or false statements of defendants to SMUD, standing alone, would have cost TEC the SMUD contract.

However, the Court of Appeals apparently accepted respondents' argument that the exception recognized in Vecchione does not apply to the tort of interference with prospective economic advantage, disposing of the Vecchione argument as follows:

> The flaw in TEC's argument is that it fails to recognize that the tort alleged here requires the plaintiff to prove that it would have obtained the economic advantage "but for" the defendants' tortious interference. Youst, 233 Cal. Rptr. at 298. In other words, a "but for" test is built into the tort's "threshold causation requirement." (App. 13a).

The "but for" test of proximate causation in California is not unique to the tort of interference with prospective

economic advantage. California tort law applies the "but-for" test across the board in tort situations.[1]

However, as a matter of public policy, California has explicitly adopted an exception to the general rule, in those special situations in which two concurring causes produce a loss and either, standing alone, would have caused the loss. In such situations, a tortfeasor simply cannot escape liability, even though the identical loss would have occurred without his wrongdoing.

There is no suggestion whatsoever, either in Youst, or any other California

---

[1]The Court of Appeals by noting that "the tort alleged here" requires a "but for" test (App. 13a), appears to have recognized a distinction between this tort and other California torts, and may have been misled by the erroneous argument of respondents that the "but for" test applies in the tort of interference with prospective economic advantage but not in other California torts.

authority, that this exception should not apply to the tort of prospective economic advantage. Neither the Youst case nor any other California prospective economic advantage case has involved a situation in which the loss was produced by two concurring causes, each of which alone would have caused the loss.

The "but for" language in Youst quoted by this Court in its Opinion is no different from that used in innumerable cases involving other kinds of torts, and in all those cases, including Youst, the use of such language and the application of the "but for" test was perfectly appropriate, on their facts. However, the factual findings by the District Court in this case place the case squarely within the special exception to the "but for" rule.

California has long applied the "but for" test of proximate causation as the general rule in all torts. In Baillargeon v. Myers, 180 Cal. 504, 182 P. 37 (1919), the California Supreme Court endorsed the following definition of proximate cause:

> ...the 'proximate cause' of an injury is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces an injury, and without which the result would not have not have occurred... Id. at p. 39. (emphasis added)

In 1950, Prosser observed, in "Proximate Cause in California," 38 California Law Review 369, 377-379 (1950), that the "but for" rule was the general rule of proximate causation applied by California courts, but also noted an important exception:

> In the ordinary case the "but for" rule works well enough as a test of causation alone. It fails, however, in one type of situation which has arisen twice in California. If two causes

> combine to bring about an injury, and either one of them alone would have been sufficient to cause the identical result, obviously some other test is required. Id. at p. 378. (emphasis added)

The two California cases referred to by Prosser were criminal cases, but in 1965 the exception was applied in a civil case, Thomsen v. Rexall Drug & Chemical Co., 235 Cal. App. 2d 775, 45 Cal. Rptr. 642 (1965).

The plaintiff in Thomsen had contracted vasculitis, an inflammation of the small blood vessels. She alleged that the defendant pharmacy had caused the condition by improperly filling a prescription. The appellate court affirmed a judgment against the pharmacy despite finding that the vasculitis could have been caused independently by the plaintiff's prior use of another drug

(cortisone) taken for an unrelated illness.

The defendants argued that plaintiff could not meet the "but for" test, since plaintiff's condition would have occurred even without the improper prescription.

Conceding that the "but for" test of proximate causation had long been the general rule of proximate causation in California, the appellate court nevertheless rejected defendants' argument:

> Defendants contend first that plaintiff has failed to establish a cause in fact, that is, one but for whose action or omission the injury would not have been sustained. Although this so-called "but for the" rule has recently been affirmed in this state [citation omitted], it is well recognized that the rule serves to explain the greater number of cases but fails in the type of situation where several causes concur to bring about an event and either one of them operating alone would have been sufficient to cause the result (Prosser, Proximate Cause in

California, 38 Cal. L. Rev., 369, 375-377). (emphasis added)

> This case appears to fall into that category since apparently plaintiff's vasculitis could have been caused by the cortisone or as well, the ingestion of the erroneous prescription. In such situations, it is recognized that neither cause can be absolved from responsibility on the ground that the identical harm would have occurred without it. Id. pp. 782-783. (emphasis added)

The Thomsen holding has been recognized and reaffirmed as the law of California in every case in which the issue has since been considered. McDonald v. Schwartz, 239 Cal. App. 2d 900, 49 Cal. Rptr. 242 (1966); Vecchione v. Carlin, 111 Cal. App. 3d 351, 168 Cal. Rptr. 571 (1980); and McGee v. Cessna Aircraft Co., 139 Cal. App. 3d 179, 188 Cal. Rptr. 542 (1983). In such situations, some courts have adopted Prosser's "substantial

factor" terminology, set forth in the aforementioned law review article, to denote that either of the two concurring causes is a sufficient basis for liability, because it was a "substantial factor" in producing the loss.

For convenience, TEC will refer to the exception noted in the foregoing authority as the "Thomsen-Vecchione exception" or the "concurring cause exception", to denote a situation in which two causes concur to produce a loss, either of which causes, standing alone, would have produced the identical loss. The District Court's finding in this case fits squarely within such exception, because either the "true" or "false" representations to SMUD by the respondents would, standing alone,

have caused TEC's loss of the SMUD contract.[2]

It is significant to note that in adopting the concurring cause exception as a part of the California law of proximate causation, the California courts have made a conscious public policy choice. It is well established in California law that "proximate cause is not a question of causation; it is simply a policy determination of whether or not the defendant should be held responsible for his acts." Valdez v. J. D. Diffenbaugh Co., 51 Cal. App. 3d 494; 124 Cal. Rptr.

---

[2]The fact that both concurring causes in this case were statements of the respondents is of no consequence in applying the Thomsen-Vecchione exception. California has recognized that although concurring causes are usually set in operation by different actors, separate concurring causes may be produced by a single defendant. Flourney v. State of California, 275 Cal. App. 2d 806, 80 Cal. Rptr. 485, 489 (1969).

467, 477 (1975). See also Prosser & Keeton, Law of Torts, at 264 (5th ed. 1988); Tate v. Canonica, 180 Cal. App. 2d 898, Cal. Rptr. 28, 35-36 (1960).

In its Opinion, the Court of Appeals noted that the logic for applying a "but for" test to the tort of interference with prospective economic advantage was to prevent the plaintiff from obtaining a "windfall" in respect to an economic opportunity which it would not have obtained even if the defendant had done nothing wrong. (App. 10a). TEC agrees with the logical basis for the "but for" test under normal circumstances, noting that the logic is equally applicable to all torts.

The same logic, however, does not apply in the Thomsen- Vecchione exception.

In Thomsen, for example, it could be said that plaintiff received a "windfall", since her vasculitis would have occurred even without defendant's improper prescription. Applying the normal logic behind the "but for" rule as noted by this Court, the plaintiff in Thomsen would not have recovered.

However, California has, as a policy decision, chosen a different and equally logical result for cases such as Thomsen. California has chosen to allow a plaintiff a "windfall" (if it is such) rather than to allow a wrongdoer to escape the consequences of his act merely because the same loss would have occurred without the wrongdoing.

The logic and policy behind the Thomsen-Vecchione exception is no less applicable to the tort of interference with prospective economic advantage. In

fact, because such tort is an intentional tort, the justification for applying the exception, based on deterrence, is even greater than in Thomsen, where the defendant's wrongdoing was merely negligent.

The well established California rules of proximate causation apply in the tort of interference with prospective economic advantage, as in all other torts; there is no authority or logical basis for arguing otherwise.

In applying a "but for" proximate causation analysis to the facts of this case, the Court of Appeals relied upon language in Youst stating that in order to recover for interference with prospective economic advantage, the plaintiff must meet a "threshold causation requirement" by adducing "proof that is is reasonably probable that the lost economic advantage

would have been realized but for the defendants' interference." Youst v. Longo, 43 Cal. 3d 64, 71, 233 Cal. Rptr. 294, 729 P.2d 728 (1987) (emphasis in original) (App. 9a). The Court of Appeals found that "a 'but for' test is built into the tort's 'threshold causation requirement.'" (App. 13a).

The Court of Appeals also relied on similar "but for" language in two cases involving alleged interference with existing contracts: Dryden v. Tri-Valley Growers, 65 Cal. App. 3d 990, 997, 135 Cal. Rptr. 720, 725 (1977); Augustine v. Trucco, 124 Cal. App. 2d 229, 246, 268 P.2d 780, 791 (1954). (App. 9a).

The application of the "but for" test in each of those cases was appropriate, and consistent with the California general rule of "but for" proximate causation "built into" all torts, because none of

those cases involved the well recognized Thomsen- Vecchione concurring cause exception. The language used in those three cases is no different from language used by California courts in innumerable cases involving other torts, where the concurring cause exception is not at issue.[3]

Neither Dryden nor Augustine involves

---

[3]For example, in Valdez v. J. D. Diffenbaugh Co., 51 Cal. App. 3d 510; 124 Cal. Rptr. 467 (1975), a personal injury negligence case, the court stated the general rule of proximate causation in California to require a showing "that the defendant's negligent act in some way contributed to the injury (e.g., but for defendant's negligence the injury would not have occurred)..." (emphasis in original) Id. at 476. The language was appropriate only because the case did not involve the Thomsen-Vecchione exception. Obviously, California courts have continued to state and apply the "but for" rule in all types of tort cases where such an exception is not present; such language and application has neither been intended nor construed to affect the Thomsen-Vecchione line of cases, which are clearly factually distinguishable.

the Thomsen-Vecchione concurrent cause exception, and neither involves the "threshold" causation element of the tort of prospective economic advantage, because each involves claims of interference with existing contracts. Neither the use of "but for" language nor the holdings in those cases are inconsistent with the Thomsen- Vecchione exception to the general "but for" rule. In each case the plaintiff failed even to state a claim, because the contract had been abandoned many months prior to any action by the defendant (Dryden), or because the complaint failed even to allege any breach or abandonment of the contract by any wrongful act of the defendants (Augustine).

Youst is the only prospective economic advantage case cited by the Court of Appeals in its Opinion, and the California

Supreme Court made clear in Youst that the threshold causation requirement refers specifically to the first of five elements of the tort (a showing of "an economic relationship" with some "probability of future economic benefit"), while the fifth element specifically requires a showing of proximate causation. Id. at 733.

If the threshold "but for" requirement were truly intended to replace the normal rules of proximate causation under California tort law, the fifth element of the tort, involving proximate causation, would be inexplicable.

The only unique thing about the "threshold causation requirement" in the tort of prospective economic advantage is that is is a threshold test. There is nothing whatsoever in Youst to suggest that the "but for" test related to the

first element should be applied in any different or broader manner than the normal "but for" test related to the fifth element of the tort, or California law in general. There is nothing whatsoever to suggest that the application of the threshold "but for" test is intended to override the clear public policy exception to the "but for" rule of proximate causation in California, as represented by Thomsen and Vecchione.

An examination of Youst and related cases reveals that the threshold requirement does not even focus on proximate causation, as such, but on the nature of the "economic relationship" providing the alleged future economic benefit, and is designed to weed out those claims in which plaintiff is unable to show a legally protectable interest,

whether defendants' interference is wrongful or not, or whether defendant even interfered or not, or whether defendant even existed or not.[4]

In Youst, an owner of a race horse alleging interference during a race could not meet the threshold requirement of causation applicable to the first element of the tort:

> It is a well-settled general tort principle that interference with the chance of winning a contest, such as the horse race at issue here, usually presents a situation too uncertain upon which to base tort liability. We agree that application of this principle should govern here. Id. at 730.

---

[4] In Youst the Court concluded, "...as a matter of law, that the threshold element of probability for interference with prospective economic advantage was not met by the facts alleged, whether or not some 'conspiracy' between a competitor and noncompetitor may have existed. (emphasis added) It was not reasonably probable, on the facts alleged, that Bat Champ would have finished in a better position." Id. at 737. (emphasis in original)

The Court went on to distinguish the speculative nature of the plaintiff's interest from the expectancies normally protected by the law, noting that such expectancies normally protected "have been those of future contractual relations..." Id. at 735. TEC's virtually consummated contract at SMUD clearly meets the test.

The Court also referred to its decision in Blank v. Kirwan, 39 Cal. 3d 311, 216 Cal. Rptr. 718, 703 P.2d 58 (1985), in terms leaving no doubt that the purpose of the threshold causation requirement is to distinguish between mere speculative interests and "economic relationships between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff," quite apart from the defendant's involvement. Id. at 736-737.

Quite obviously, the purpose of the threshold causation requirement California is to weed out, before even considering the defendant's actions under normal proximate cause rules, claims in which plaintiff fails even to allege a legally protectable interest. It is inconceivable that such test could be intended to affect the Thomsen-Vecchione concurring cause exception to the general "but for" rule of California proximate causation.[5]

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

---

[5] See also Campbell v. Rayburn, 129 Cal. App. 2d 232, 267 P.2d 671 (1954), the only other prospective economic advantage case cited by defendants, in which the claim was dismissed on demurrer because no facts were even alleged to show any prospect of economic gain to plaintiff quite apart from the action or inaction of the defendant.

Respectfully submitted,

James S. Tipton, Jr.

James S. Tipton, Jr.
Counsel of Record for
Petitioner TEC
2610 Plaza Tower
P.O. Box 1275
Knoxville, Tennessee 37901
(615) 525-5300

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document has been served upon counsel for the defendants-appellees in the following manner: RADCAL Engineering, Inc. and Mr. Robert D. Smith, c/o RADCAL Engineering, Inc., P.O. Box 219, Plum Branch, South Carolina 29845, by United States mail, with proper postage thereon; Mr. James P. Waring at 12 Converse Lane, Oak Ridge, Tennessee 37830 by United States mail, with proper postage thereon; Michael Wischkaemper at the Law Offices of Michael Wischkaemper, 2111 Palomar Airport Road, Suite 300, Carlsbad, California 92009 by United States mail, with proper postage thereon; and L. Anderson Galyon at Kennerly, Montgomery & Finley, 1701 Plaza Tower, Knoxville, Tennessee 37929 by United States mail, with proper postage thereon. This 29th day of November, 1989.

James S. Tipton, Jr.

JST/tlc:225,1:P0020J
2.19

APPENDIX

NO. 88-5761
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TECHNOLOGY FOR ENERGY CORPORATION,	)
Plaintiff-Appellant,	)
v.	)
SCANDPOWER, A/S; SCANDPOWER, INC.,	)
Defendants,	)
RADCAL ENGINEERING, INC.; FLUID COMPONENTS, INC.; ROBERT D. SMITH; JAMES P. WARING; MALCOLM M. MCQUEEN; AND ROBERT A. DEANE,	)
Defendants-Appellees.	)

On Appeal from the United States District Court for the Eastern District of Tennessee.

Decided and Filed July 26, 1989

Before: KENNEDY, JONES, and WELLFORD, **Circuit Judges.**

KENNEDY, Circuit Judge. Appellant Technology for Energy Corporation ("TEC") brought a tort action alleging intentional interference with prospective economic advantage against Scandpower A/S and its American subsidiary Scandpower, Inc. (collectively "Scandpower"); Radcal Engineering, Inc. ("REI"); Fluid Components, Inc. ("FCI"); Robert D. Smith; James P. Waring; Malcom M. McQueen; and Robert A. Deane. TEC and Scandpower reached a settlement prior to trial. At the close of TEC's case against the remaining defendants, the district court granted defendants' motion to dismiss pursuant to Fed. R. Civ. P. 41, and TEC brought this appeal. We conclude that TEC failed to prove that it probably would have obtained the contract but for defendants' wrongful interference, as required by California law. Accordingly,

the judgment of the District Court is affirmed.

I.

In 1976, Scandpower developed and patented a technology known as RADCAL, which is used to monitor conditions inside nuclear reactors. Defendant Smith was a co-inventor of the technology. Lacking the resources for commercial development of the RADCAL technology, Scandpower wished to find a joint venture partner in the United States. In early 1983, Scandpower and TEC began protracted negotiations concerning a possible joint venture or exclusive license. No formal agreement was ever reached. However, the District Court found that "the parties did expressly agree to permit TEC to sell RADCAL technology on a 'case-by-case' basis." TEC entered into several

contracts to supply RADCAL technology over the ensuing months.

In late 1983 and early 1984, TEC suffered a downturn in its business, prompting Smith and Waring to consider other possible joint-venture partners. Smith and other Scandpower officials began discussions with FCI in 1984, but negotiations with TEC continued.

The District Court found that "[s]ometime prior to February 1, 1985," TEC submitted a bid on the contract which is the subject of this dispute--a contract to supply RADCAL technology to the Sacramento Municipal Utility District ("SMUD"). Scandpower and TEC had reached "case-by-case" agreement permitting TEC to seek the SMUD contract.

At about the same time, "early 1985," Scandpower granted the exclusive rights to

manufacture and market RADCAL technology in the United States to REI, a corporation formed by Smith and Waring. REI then granted a sublicense to FCI.

At its board meeting of March 7, 1985, SMUD apparently was about to accept TEC's bid when Smith and officials of FCI represented to SMUD that TEC was in dire financial straits and that TEC had no rights to RADCAL technology. The District Court found that the first representation was true, but the second was false, since Scandpower had given TEC "case-by-case" permission to pursue the SMUD contract.[1] SMUD asked TEC to produce a supply bond or

---

[1]The District Court found that FCI was privileged to compete for the SMUD contract. Although the District Court made no explicit finding, it necessarily follows that the District Court found that TEC's case-by-case agreement with Scandpower did not grant TEC any exclusive rights to RADCAL.

letter of credit and documentation of its rights to RADCAL technology. TEC was unable to satisfy either request, and SMUD rejected its bid. Based on the statements of SMUD officials, the District Court determined that failure to comply with either request--standing alone--would have caused SMUD to reject TEC's bid.

II.

On appeal TEC does not challenge the District Court's factual findings, but only its legal conclusion that TEC's damages were not proximately caused by defendants. Under California law,[2] proof

---

[2]The District Court assumed without deciding that the law of California, rather than Tennessee, applies to TEC's cause of action. The District Court found that Tennessee law does not recognize the tort of interference with prospective economic relations. See Taylor v. Nashville Banner Pub. Co., 573 S.W.2d 476, 485 (Tenn. App. 1978), cert. denied 441

of "damages to the plaintiff proximately caused by the acts of the defendant" is an essential element of the tort of interference with prospective economic advantage. Buckaloo v. Johnson, 14 Cal.3d 815, 827, 122 Cal. Rptr. 745, 752, 537 P.2d 865 (1975). The District Court found that plaintiff had not proved the existence of this element, because TEC's injury resulted from an "intervening cause"--TEC's failure to provide the documentation and financial assurances required by SMUD--not from defendants' actions. We conclude that this analysis

---

U.S. 923 (1979). Since it concluded defendants would prevail under either state's law, the Court deemed it unnecessary to solve the choice of law puzzle. TEC does not contest the District Court's application of California law to its claims; indeed, it argues California law "is clearly applicable." Like the District Court, we find it unnecessary to reach the choice-of-law question.

misapplied the law of causation. An intervening cause "is one which operates without respect to defendant's alleged cause. It would have been operating...if defendant's cause was wholly out of the picture." Werkman v. Howard Sink Corp., 97 Cal. App. 2d 418, 218 P.2d 43, 48 (1950). TEC's failure to provide the requested documentation cannot be deemed an intervening cause, because SMUD's request for documentation was prompted by defendants' allegedly tortious acts.

While we disagree with the District Court's "intervening cause" analysis, we conclude that the decision below should be affirmed on other grounds. In order to make out a claim for intentional interference with prospective economic advantage, the plaintiff must meet a "threshold causation requirement" by

adducing "proof that it is reasonably probable that the lost economic advantage would have been realized but for the defendant's interference." See Youst v. Longo, 43 Cal.3d 64, 71, 233 Cal. Rptr. 294, 298, 729 P.2d 728 (1987) (emphasis in original). In addition:

> It has been repeatedly held that a plaintiff, seeking to hold one liable for unjustifiably inducing another to breach a contract, must allege that the contract would otherwise have been performed, and that it was breached and abandoned by reason of the defendant's wrongful act and that such act was the moving cause thereof.

Dryden v. Tri-Valley Growers, 65 Cal. App. 3d 990, 997, 135 Cal. Rptr. 720, 725 (1977) (emphasis added); see also Augustine v. Trucco, 124 Cal. App. 2d 229, 246, 268 P.2d 780, 791 (1954). The logic behind this requirement is obvious; it prevents the plaintiff from obtaining a

"windfall" in the form of damages for interference with an economic opportunity which it would not have obtained even if the defendant had done nothing wrong.

TEC cannot meet California's threshold causation requirement. The District Court found that defendants' statements concerning TEC's RADCAL rights were false, but that their warning about TEC's precarious financial situation was truthful. The court also found that FCI was privileged to compete with TEC for the SMUD project. SMUD had not yet awarded the contract; and since FCI was privileged to compete, it was not wrongful for FCI truthfully to inform SMUD about TEC's financial difficulties. See e.g., Environmental Planning and Information Council v. Superior Court, 36 Cal.3d 188, 194, 203 Cal. Rptr. 127, 131, 680 P.2d

1086 (1984) ("competitor's stake in advancing his own economic interest" sufficient justification for interference where "contractual relations are merely contemplated or potential"). Acting on this information, SMUD requested a bond or letter of credit, but TEC was unable to procure either. The District Court found that this difficulty alone was sufficient to "doom" TEC's bid. Therefore, it was not "reasonably probable" that TEC would have obtained the SMUD contract but for wrongful interference by FCI. TEC still would have lost the contract due to its inability to allay SMUD's concerns about its financial plight--concerns which arose form privileged disclosures by FCI.

Appellant protests that under the District Court's findings of fact, the defendants' false allegation that TEC

lacked rights to the RADCAL technology should be analyzed as a "concurrent cause" of TEC's injury. A concurrent cause constitutes the legal or "proximate" cause of an injury if it was a "substantial factor" in bringing about the injury--even is the injury would have occurred in the absence of the concurrent cause. See e.g., Vecchione v. Carlin, 111 Cal. App. 3d 351, 358-59, 168 Cal. Rptr. 571, 575-76 (1980). TEC contends that since either FCI's truthful representations or its false ones would have doomed the contract, they are concurrent causes. Therefore, TEC argues, it can recover if the false representations were a "substantial factor" in SMUD's decisionmaking process.

The flaw in TEC's argument is that it fails to recognize that the tort alleged

here requires the plaintiff to prove that it would have obtained the economic advantage "but for" the defendants' tortious interference. Youst, 233 Cal. Rptr. at 298. In other words, a "but for" test is built into the tort's "threshold causation requirement."[3] As discussed above, TEC would not have obtained the SMUD contract "but for" FCI misrepresentations; the District Court found as a fact that the truthful, privileged disclosures about TEC's dire

---

[3]As the California Supreme Court said in Youst:

> Although varying language has been used to express this threshold requirement, the cases generally agreee that it must be reasonably probable [that] the prospective economic advantage would have been realized but for defendant's interference.

Id. (emphasis added).

financial conditions alone would have cause SMUD to reject TEC's bid.

Accordingly, the judgment of the District Court is AFFIRMED.

Filed Jun 1, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Civ. 3-85-603

TECHNOLOGY FOR ENERGY CORPORATION,

Plaintiff

v.

SCANDPOWER A/S, SCANDPOWER, INC., RADCAL ENGINEERING, INC. FLUID COMPONENTS, INC., ROBERT D. SMITH, JAMES P. WARING, MALCOLM M. McQUEEN, and ROBERT A. DEANE,

Defendants

MEMORANDUM OPINION

This is an action by Technology for Energy Corporation ("TEC") for breach of express or implied contracts and interference with contractual or business relationships. TEC also raises equitable theories of equitable estoppel, promissory estoppel, restitution, quantum meruit and

unjust enrichment. Jurisdiction is based on diversity of citizenship, 28 U.S.C. §1332, and is not in dispute. Plaintiff's original complaint named as defendants Scandpower A/S, a Norwegian corporation; Scandpower, Inc. (the American subsidiary of Scandpower A/S); Radcal Engineering, Inc. ("Radcal Engineering"); Fluid Components, Inc. ("FCI"); Robert D. Smith ("Smith"); and James P. Waring ("Waring"). Two additional parties, Malcolm M. McQueen ("McQueen") and Robert A. Dean ("Deane"), were later added as defendants. After the lawsuit was filed, plaintiff settled its dispute with Scandpower A/S and Scandpower, Inc., and those defendants were dismissed. Subsequently, the liability phase of this trial was bifurcated from the damages phase, and the liability phase went to trial before the

undersigned, without intervention of a jury, on May 9 through May 16, 1988.

At the close of plaintiff's proof, this court granted the remaining defendants' motions to dismiss pursuant to Rule 41(b), Fed.R.Civ.P., on each of plaintiff's claims. The following constitutes this court's findings of fact and conclusions of law in conformity with Rule 52(a), Fed.R.Civ.P.

I

Findings of Fact

1. Beginning in 1976, Scandpower A/S, a Norwegian corporation, and its U.S. subsidiary, Scandpower, Inc., developed and patented a technology known as RADCAL. The RADCAL technology is basically the use of a long, thin metal rod origially used as a "gamma thermometer", to measure nuclear fuel power when inserted into a

nuclear reactor. The two primary functions of the RADCAL rods are (1) power monitoring; and (2) liquid level monitoring to insure that the core of the nuclear reactor is being properly cooled. Robert D. Smith, vice-president of Scandpower, Inc., was a co-inventor of the RADCAL technology and assigned his rights in the technology to Scandpower in return for a small percentage of Scandpower's income. Scandpower A/S and Scandpower, Inc. were consulting firms, with no capital, ability or desire to manufacture RADCAL products.

2. In 1981, the United States Nuclear Regulatory Commission, as a result of the accident that occurred at Three Mile Island, required all U.S. nuclear reactors to have, within a specified time, satisfactory liquid level monitoring

systems. Since the RADCAL technology could effectively serve this function, these regulations opened up a lucrative RADCAL market in the United States. Scandpower was aware of this substantial potential market and in 1983 was carrying out efforts to find a joint venture partner to help it carry out U.S. development of the RADCAL technology.

3. Technology for Energy Corporation ("TEC") is a nuclear industry services and instrumentation firm founded by three University of Tennessee professors in 1975. TEC also had expertise in gamma thermometry. TEC first performed work for Scandpower in 1979, fabricating some RADCAL specimen rods for testing at the Oak Ridge National Laboratory.

4. In early 1983, TEC and Scandpower carried on negotiations in earnest in an

attempt to find an arrangement for the development and marketing of the RADCAL technology in the United States. Originally, Torstein Bohler, president of Scandpower A/S, and Robert Smith hoped to work out a joint venture arrangement with some American corporation. Later, Bohler realized that a joint venture arrangement would be unlikely and began negotiating with TEC toward the creation of an exclusive license agreement wherein Scandpower would grant TEC an exclusive license to manufacture and market the RADCAL technology in the American market. Smith was strongly opposed to Scandpower giving up any license agreement in the RADCAL technology.

5. From February, 1983 through the end of June, 1983, TEC negotiated with Scandpower through TEC's vice-president of

products, Ron Nutt, toward the creation of an exclusive license agreement. By the end of June, 1983, the parties had exchanged a number of preliminary proposals. Bohler wished to achieve several objectives in the ultimate contract: (1) that some money be paid by TEC upon the signing of the agreement; (2) that a mechanism be provided whereby most of the royalties to be paid under the license agreement would come in the form of TEC paying Smith and other Scandpower consultants for work they would perform; (3) that TEC give certain minimum investment guarantees to assure that it would vigorously promote the product; and (4) that Scandpower would have some influence in the development of the product by having a Scandpower expert on site at the TEC facility.

6. While these preliminary negotiations were going on, TEC negotiated a contract for the purchase of RADCAL technology by Arkansas Power & Light ("AP&L"). It is obvious that during this period the parties desired to negotiate a final, binding contract governing the hoped for exclusive license agreement.

7. On June 29 and 30, 1983, Torstein Bohler and Robert Smith met with TEC officials in Knoxville to negotiate the license agreement. These negotiations produced a document styled "Memorandum of Understanding Between Technology for Energy Corporation and Scandpower Regarding Proposed Gamma Thermometer Business Agreement." See Exhibit 8. Ron Nutt mailed a copy of the Memorandum of Understanding to Bohler on July 7, 1983. Attached to the Memorandum of

Understanding was a cover letter which contained, inter alia, the following language:

> We at TEC again enjoyed the opportunity to discuss with you pursuit of an agreement regarding RGTs which will be mutually beneficial to our companies. As promised, we have forwarded to Bob Smith (copy enclosed) a Memorandum of Understanding regarding our proposed agreement which should summarize our meetings of June 29 and 30. It is our understanding that Bob will, with the assistance of ScP lawyers, draft a formal agreement for review by TEC and TEC legal counsel. Once both the ScP and TEC lawyers are satisfied with the document, we can submit the agreement to our respective Boards of Directors for final approval. We look forward to a timely executive [sic] of this activity.
>
> . . . . . .
>
> As we briefly discussed during our meeting, there are 16 RGT strings/rods (6 Phase II; 6 Phase II options; 4 Spares option) in the total contract, at an average sales price of $97,500.00 each. At a 15% royalty, a ScP subcontract work pool could be set aside in the amount of $234,000.00 to be billed over the next 18 months. We expect that some of the subcontracts would not necessarily be in direct support

> AP&L, but most likely in RGT marketing, R&D, and manufacturing start-up activities.
>
> . . . . .
>
> Jim and I will be working closely together during the coming months to insure a smooth transition, especially concerning the TEC/ScP relationship and pending agreement.

Exhibit 8. The specific language of the second quoted paragraph above referred to the arrangements being worked out regarding the AP&L contract. The court finds from a review of the above cover letter, the Memorandum of Understanding and other evidence presented that no final agreement, either express or implied, was intended to have been entered into during the July 29-30, 1983 negotiations. The evidence shows that before any long-term contract would be finalized, the parties intended that the contract be reviewed by their attorneys and subsequently approved by each of their Boards of Directors.

Moreover, the evidence showed that the final contract would also have to be approved by Scandpower's French affiliates who had obtained RADCAL rights in France. The court finds no mutual assent to a long-term license agreement.

8. The court also finds that the alleged long-term contract lacks definiteness in a number of specifics, including specific identification of the items which were to bear royalty; computation of the "net sales price" that was to be the basis of royalty; and the warranties to be made by Scandpower regarding RADCAL patents.

9. The court finds that in the year and one-half following the July 29-30 meeting, the parties did expressly agree to permit TEC to sell RADCAL technology on a "case-by-case" basis. TEC entered into

contracts for sales of the RADCAL technology, in addition to the AP&L contract, to Savannah River Plant, Consumers Power and General Atomics. TEC invested over $500,000.00 in the marketing of RADCAL products in the United States. However, no long-term licensing contract was ever entered into.

Royalties from the AP&L contract were used to set up a "work pool" out of which Robert Smith and James Waring were paid for consulting work that they performed at TEC through 1983 and 1984. During this period, the parties continued to negotiate for a final long-term license agreement, and the court finds that, in investing in the RADCAL market, TEC gambled that such a contract would eventually be signed. On December 29, 1983, Bohler wrote to Dr. Ackermann as follows:

With reference to Dr. R. Nutt's letter of December 7, 1983, and telephone conversation of December 21 with J. C. Robinson, I am responding to TEC's draft license agreement with ScP, prepared by your lawyer. We have studied this draft and found that it is not entirely in agreement with our summary of understanding arrived at in the joint TEC/ScP meetings last summer, especially with respect to the rights of TEC outside U.S., (mainly Article IV). On a number of points there are also major differences between your draft and the earlier draft prepared by our lawyer especially with respect to SCP's responsibilities and warranties, (mainly Article VII). The basic principle and financial arrangements are, however, as agreed upon, and we don't foresee that any of these problems are insurmountable. Mr. Bob Smith together with our lawyer will closely go through the two draft-agreements and hopefully come up with a final draft acceptable to both TEC and SCP. It is our intention to conclude the formal contract with TEC as soon as possible.

. . . . . .

. . . This would enable TEC to proceed with confidence of no interference for Scandpower on current RADCAL bids and contracts, and to utilize SCP resources as part

> of the work pool as outlined in our draft agreements. . . .

Exhibit 14. This letter is strong evidence that no long-term contract was entered into, but Scandpower did authorize TEC to negotiate individual contracts on a case-by-case basis while negotiations continued for a long-term agreement.

10. During late 1983 and early 1984, TEC suffered a number of severe financial setbacks which seriously affected its profitability. These setbacks included the cutoff by Congress of funds to the Clinch River Breeder Reactor Project where TEC had contracts to do substantial work and the loss of a contract on a bid TEC had made on a job known as the "South Texas Project". On February 27, 1984, Bohler wrote a letter to TEC's president, Norbert J. Ackermann, Jr., enclosing a

tentative draft agreement. In that letter, Bohler requested that TEC provide Scandpower with its annual reports for 1982 and 1983, apparently out of concern regarding TEC's financial difficulties suffered in 1983.

11. During early 1984, Smith and Waring, being aware of TEC's financial difficulties, began looking for alternative methods of profiting from the RADCAL technology. They proposed to potential competitors of TEC a joint venture arrangement under which Smith and Waring would obtain some stock ownership and also would provide employment for certain employees of TEC who were then willing to abandon the TEC corporation.

12. Through the following year, TEC continually pressed Scandpower to finalize a long-term license agreement. No

agreement was ever finalized, however, due to both an inability of the parties to resolve all of their disputes and due to Scandpower's concern over TEC's financial situation. TEC became concerned with the fact that is had invested substantial amounts of money in RADCAL development and still had no long-term agreement. Scandpower assured TEC on several occasions that it would not interfere with short-term agreements negotiated by Scandpower with various nuclear plants. An example of this assurance is found in a July 4, 1984 letter from Bohler to Ackermann. Mr. Bohler wrote:

> 5. If TEC wants more assurance from SCP in addition to statements made by SCP to TEC in letter dated December 29, 1983, to enter into specific near term RADCAL contracts, SCP is prepared to sign a temporary agreement with TEC.

Exhibit 23. No such temporary agreement was ever formally executed, but it is obvious that TEC and Scandpower had an agreement that TEC had permission to, at least temporarily, execute individual contacts for the use of RADCAL technology while negotiations for an exclusive license agreement were being carried out and that Scandpower would not interfere with those contracts.

13. In April, 1984, Bohler and Smith met with officials of Fluid Components, Inc. ("FCI") in a meeting room at the San Francisco Airport regarding possibly selling the RADCAL licensing rights to FCI. Also at the meeting were two TEC employees, Dennis Bell and Russ Nault, who were apparently seeking better business opportunities. No contract was entered

into at that time between Scandpower and FCI.

The next day, Bohler flew to Knoxville for a meeting with TEC officials. Mr. Bohler did not mention to them the fact that he had attended negotiations the previous day regarding the transfer of RADCAL rights to one of TEC's competitors. In his meetings with TEC officials in Knoxville, Mr.Bohler indicated that the negotiations concerning a formal, long-term contract would continue and that the Scandpower Board of Directors might require some evidence of an improved financial situation at TEC before it would be approved.

14. In the summer of 1984, Ackermann was replaced by Currie Spivey as chief executive officer of TEC. In a memorandum dated October 23, 1984, A. D. White of

TEC wrote to Spivey and summarized the status of the Scandpower-TEC negotiations as follows:

> . . . After several years of unsuccessfully attempting to find a joint venture partner in the U.S. to pursue this product business, they [Scandpower] have settled for a licensing agreement hopefully with TEC.
>
> The TEC strategy is to establish a competitive barrier to the RADCAL technology through an exclusive license to the patents in the United States and potentially in eight other countries (Edf/Intertechnique have exclusive license in France). TEC and SCP have been in serious negotiations for an acceptable licensing agreement for almost two years. Some of the reasons for the delay in a final agreement are as follows:
>
> . . . . .
>
> During the entire time of these continuing negotiations TEC has aggressively pursued product qualification ($567K over and above planned cost - AP&L Phase I) and market development ($275K - 1983, $520K - YTD Sept. 1984) based upon written assurances from SCP that while we are negotiating in good faith an

> acceptable Agreement, all identified opportunities ($4.5M), outstanding proposals ($8.4M) and active contracts ($2.4M) would be handled as if the Agreement were in place.

Exhibit 86

In late 1984 and early 1985, TEC was still attempting to negotiate a formal long-term agreement with Scandpower. On January 31, 1985, Bohler presented TEC with a handwritten document entitled "Short Term Agreement Requirements" which provided that no long-term agreement would be possible until TEC had reached financial stability. Exhibit #89. Bohler also listed five requirements necessary for establishing such an arrangement. Id. TEC responded the next day with a document entitled "TEC Response to Scandpower Requirements". Exhibit #91. The document began with the statement that "TEC agrees that a short-term agreement is

currently in the best interest of both parties", and then went on to respond to the five points raised in Bohler's handwritten memorandum. Id. The Court finds that the above correspondence demonstrates that as late as early 1985 the parties were still aware that no long-term license agreement had been entered into between TEC and Scandpower.

15. In early 1985, Scandpower transferred the exclusive right to manufacture and market RADCAL technology in the United States to Radcal Engineering, Inc., a corporation organized by Smith and Waring. Radcal Engineering then established FCI as sub-license of the of RADCAL technology. On February 8, 1985, Scandpower's attorney wrote to Spivey notifying him that Scandpower had no rights or licenses in any of the

intellectual property of Scandpower. Exhibit #93.

16. Sometime prior to February 1, 1985, TEC had submitted a bid to supply RADCAL technology to the Sacramento Municipal Utility District ("SMUD"). The proof showed the TEC's was the only conforming bid and there was a high probability that its bid would be accepted. On March 7, 1985, when SMUD was apparently ready to award the bid to TEC, representatives of Scandpower, including Bob Smith, and FCI visited officials of SMUD in their offices in Sacramento. At that meeting, Smith and the FCI officials made two representations to the SMUD officials concerning TEC: (1) that TEC was having serious financial difficulties; and (2) that TEC had no rights in the RADCAL technology. The former statement

was true; the latter statement was false. The court finds that Scandpower had authorized TEC to negotiate the SMUD contract. Upon receiving this information, SMUD offered TEC an opportunity to address the issue concerning its financial difficulty by providing some form of financial assurance, either through a supply bond or a letter of credit. TEC was unable to provide such assurance. SMUD also offered TEC an opportunity to provide evidence of its RADCAL rights through some documentation, i.e., a letter from Scandpower. TEC never provided such documentation to SMUD.

The proof was uncontradicted and the court finds that either the absence of financial assurances by TEC or the absence of proof of its RADCAL rights would have

doomed TEC's SMUD bid. Deposition testimony of SMUD officials makes it clear that SMUD would refuse to accept TEC's bid without both the financial assurance and the evidence of the RADCAL rights. The court also finds that the defendants' representation to SMUD that TEC had no RADCAL rights was not a proximate cause of SMUD's refusal to accept the TEC bid. TEC's financial difficulties and inability to provide financial assurances through a supply bond or letter of credit was, standing alone, enough to cause SMUD to deny TEC's bid. In addition, TEC's own failure to provide SMUD with evidence of its RADCAL rights after the defendants raised that issue and SMUD gave TEC an opportunity to provide documentation is a sufficient intervening cause to absolve any liability of defendants with respect

to any misrepresentation that may have been made concerning TEC's RADCAL rights. Ultimately, SMUD declined to award its gamma thermometer contract to any of the bidders, choosing to perform the work itself.

17. With respect to other short-term RADCAL contracts negotiated by TEC, the court finds no evidence that defendants unjustifiably interfered with any of them either before or after the contracts were entered into.

18. The court finds no evidence of any detrimental reliance by TEC on any statements of actions of defendants. The court also finds no receipt by defendants of any benefit from the plaintiff under circumstances rendering it inequitable for defendants to retain those benefits without compensating plaintiff.

19. The court finds that the following exhibits not admitted into evidence at the time of trial are admissible and have been considered by this court: Exhibit 185; Exhibit 306.

II

Conclusions of Law

1. The essential elements of contracts, express and implied, include a meeting of minds and mutual assent to its terms which is founded on sufficient consideration and is sufficiently definite. Forest, Inc. v. Guaranty Mfg. Co., 534 S.W.2d 853 (Tenn.Ct.App. 1975). To form a valid contract there must be a meeting of the minds at the time of execution or by acquiescence of adoption, which is a subsequent meeting of the minds. Moore v. New Amsterdam Cas. Ins. Co., 199 F.Supp. 941 (E.D. Tenn. 1961).

This apparent mutual assent must be gathered from the language employed by the parties, or manifested by their words or acts. The undisclosed intention of a party is immaterial in the absence of mistake, fraud or the like, and the law imputes to a person an intention corresponding to the reasonable meaning of his words or acts. Sutton v. First National Bank, 620 S.W.2d 526 (Tenn.Ct. App. 1981). An unexpressed intention of one of the parties not known to the other, either expressly or by reasonably implication, forms no part of the mutual act. See Arkansas Dailies, Inc. v. Dan, 36 Tenn.App. 663, 260 S.W.2d 200 (1953).

In the instant case, the court concludes from the language employed by the parties and the words or actions taken by them that no express long-term contact

to license TEC to develop, manufacture or market the RADCAL technology was ever entered into. The proof demonstrated that the parties intended that several points be resolved and approval of the Board of Directors of each company be obtained before a long-term contract would be created.

2. Plaintiff also raises the question of an implied in fact long-term contract. To have a contract implied in fact, there must have been mutual agreement between the parties; that is, there must be either circumstances or conduct from which it can be inferred that the parties had a meeting of the minds even though the contract was not expressly stated. Judd v. Heitman, 402 F.Supp. 929, 933 (M.D. Tenn. 1975). The court concludes that the circumstances in this

case do not create an inference of an implied long-term contract for license of the RADCAL rights. Rather, the circumstances indicate that the parties contemplated that certain conditions would be met before the long-term agreement could be entered into.

3. The court concludes that there were short-term agreements or contracts between Scandpower and TEC which permitted TEC to market the RADCAL technology on a job-by-job basis while the parties continued to negotiate for a long-term license agreement. One of the projects which Scandpower allowed TED to bid on was the SMUD project. The SMUD project is the only potential contract which plaintiff claims it did not obtain because of interference from the defendants.

4. Plaintiff contends that the defendants' actions with regard to the SMUD project constituted the tort of intentional interference with prospective economic advantage. This tort, as recognized in California law, has the following elements:

> 1. An economic relationship containing the probability of future economic benefit to the plaintiff;
>
> 2. Knowledge by the defendant of the existence of the relationship;
>
> 3. Intentional acts on the part of the defendant designed to disrupt the relationship;
>
> 4. Actual disruption of the relationship; and
>
> 5. Damages to the plaintiff proximately caused by the acts of the defendant.

Buckaloo v. Johnson, 14 Cal.3d 815, 827, 122 Cal.Rprt. 745, 537 P.2d 865 (1975).[1]

---

[1]This claim raises a choice of law

There is a privilege or justification for interference with prospective business advantage in legal or justified competition. See id.

The court concludes that any

---

question. In multi-state tort cases, Tennessee applies the laws of "the state where the last event necessary to make an act reliable for an alleged tort takes place." Cesnik v. Chrysler Corp., 490 F.Supp. 859, 872 (M.D. Tenn. 1980). Defendant contends that any injury resulting from interference with the prospective SMUD contract would have occurred in Tennessee. To date, Tennessee has not recognized the tort of interference with prospective economic advantage. See Taylor v. Nashville Banner Publishing Company, 573 S.W.2d 476, 485 (Tenn.App. 1978). The court declines to decide whether Tennessee or California law is applicable in this case and whether Tennessee would recognize the tort of interference with prospective economic advantage since it is unnecessary to the resolution of this lawsuit. The court assumes that if Tennessee law applied and Tennessee did recognize this tort, its elements would be similar to those found in California law. In any event, for the reasons set out on pages 18-19 of this opinion, the court concludes that plaintiff failed to establish an essential element of this tort.

unjustified interference with the prospective SMUD contract by the defendants was not a proximate cause of any injury to the plaintiff. At first glance this appears to be a "concurring cause" situation (where two causes concur to bring about an event, and either one of them, operating alone, would have been sufficient to cause the identical result). See Prosser and Keeton on Torts, §41 at p.266 (L.Ed. 1984). In such situations, both Tennessee and California law follow the "substantial factor" test: the defendant's conduct is a proximate cause of the event if it was a substantial factor in bringing it about. See, e.g., Carney v. Goodman, 38 Tenn.App. 55, 270 S.W.2d 572 (1965); Snow v. A. H. Robins Company, 165 Cal.App.3d 120, 211 Cal.Rptr.

271 (1985).

In the instant case, the court concludes that the defendants were justified in providing SMUD with the information regarding TEC's poor financial condition. The information was public knowledge, SMUD needed and wanted the information, and in the interest of free competition Scandpower was justified in providing it to SMUD.

With respect to the statements which defendants communicated to SMUD concerning TEC's rights to market the RADCAL technology, the court concludes that since other factors intervened (i.e., SMUD offered TEC the opportunity to provide evidence of its RADCAL rights), it was not a substantial factor in causing the injury and therefore cannot be called a proximate cause of the injury. Since plaintiff

failed to prove the essential proximate cause element of the tort of intentional interference with prospective business advantage, that claim must be dismissed under California law, or if the tort were recognized in this state, under Tennessee law.

5. Plaintiff also seeks to recover on a number of equitable theories: promissory estoppel, equitable estoppel, unjust enrichment, quasi-contract, quantum meruit, the creation of a constructive trust, and under "the court's inherent equitable powers."

Estoppels are based on the reliance on a statement of another to one's detriment. Tennessee Asphalt Company v. Purcell Enterprises, Inc., 631 S.W.2d 439 (Tenn.Ct.App. 1982). It is essential that the parties sought to be estopped should

have acted with knowledge of the facts and of its rights, and it is also essential that the party asserting estoppel was without knowledge or the means of knowledge of the facts on which he bases his claim of estoppel, was influenced by or relied on the conduct of the person sought to be estopped, and changed his position thereon to his injury, or was misled thereby to his prejudice. Freeman v. Martin Robowash, Inc., 457 S.W.2d 606 (Tenn.Ct.App. 1970). The court concludes that there was no reliance in this case by TEC on statements or actions of the defendants. Plaintiff cannot recover under any estoppel theory.

6. Actions brought upon theories of unjust enrichment, quasi-contract, contracts implied in law, and quantum meruit are essentially the same. The

terms are used interchangeably to describe that class of implied obligations where, on the basis of justice and equity, the law will impose a contractual relationship between parties, regardless of their assent thereto. Paschall's, Inc. v. Dozier, 407 S.W.2d 150, 154 (Tenn. 1966). These allegations are created on the principle that a party receiving the benefit desired by him, under circumstances rendering it inequitable to retain it without making compensation, must do so. Id.[2] The court does not find that any of the defendants in this case received a benefit under circumstances which would render it inequitable to

---

[2]Theories of restitution and the creation of constructive trusts raise similar equitable concerns. Browder v. Hite, 602 S.W.2d 489, 491-92 (Tenn.Ct.App. 1980).

retain it without compensating TEC. If anyone received a benefit from TEC's investment in RADCAL marketing in this case, it was the Scandpower companies, and those companies are no longer defendants. Moreover, the circumstances do not warrant compensating TEC for its "investment" in the RADCAL market. The proof demonstrates that TEC "gambled" that it would eventually be able to obtain a long-term exclusive contract with Scandpower to market RADCAL technology. TEC took that gamble and it lost. The court cannot use its equitable powers now to place the losses from that gamble on the defendants. For these reasons, plaintiff's claims on each of the other equitable theories must also be dismissed.

III

Conclusion

In light of the foregoing, defendants' motions to dismiss each of plaintiff's claims at the close of plaintiff's proof are GRANTED, and this action is DISMISSED. Rule 41(b), Federal Rules of Civil Procedure.

Order accordingly.

James H. Jarvis,

UNITED STATES DISTRICT JUDGE

Filed Jun 1, 1988, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Civ. 3-85-603

TECHNOLOGY FOR ENERGY CORPORATION,)

Plaintiff)

v.)

SCANDPOWER A/S, SCANDPOWER, INC., RADCAL ENGINEERING, INC., FLUID COMPONENTS, INC., ROBERT D. SMITH, JAMES P. WARING, MALCOLM M. McQUEEN, AND ROBERT A. DEANE,)

Defendants)

O R D E R

For the reasons set forth in the Memorandum Opinion this day passed to the Clerk for filing, it is hereby ORDERED that defendants' motions to dismiss each of plaintiff's claims at the close of plaintiff's proof are GRANTED, and this

action is DISMISSED. Rule 41(b), Federal Rules of Civil Procedure.

E N T E R :

James H. Jarvis,

UNITED STATES DISTRICT JUDGE

Filed Jun 17, 12:25 PM, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Civ. 3-85-603

TECHNOLOGY FOR ENERGY CORPORATION,)
)
Plaintiff)
)
v.)
)
RADCAL ENGINEERING, INC., et al.,)
)
Defendants)

O R D E R

Plaintiff has filed a motion pursuant to Rule 52, Federal Rules of Civil Procedure, requesting this court to amend its memorandum opinion to correct a clerical error which appears in Paragraph 19 of the court's findings of fact. It appearing that the clerical error in fact appears, the court's memorandum opinion is hereby AMENDED as follows:

The reference to "Exhibit 306" is hereby DELETED and REPLACED with "Exhibit 386".

E N T E R :

James H. Jarvis

UNITED STATES DISTRICT JUDGE

Filed July 26, 1989, Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
NO. 88-5761

TECHNOLOGY FOR ENERGY CORPORATION,
Plaintiff-Appellant,

v.

SCANDPOWER, A/S; SCANDPOWER, INC.,
Defendants,
RADCAL ENGINEERING, INC.; FLUID COMPONENTS, INC.; ROBERT D. SMITH; JAMES P. WARING; MALCOM M. McQUADE; ROBERT A. DEANE
Defendants-Appellees.

BEFORE: KENNEDY, JONES and WELLFORD, Circuit Judges.

J U D G M E N T

ON APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district

court in this case be and the same is hereby affirmed.

IT IS FURTHER ORDERED that Defendants-Appellees recover from Plaintiff-Appallant the costs on appeal, as itemized below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Issued as Mandate:

COSTS:

Filing fee.....$
Printing.....$

Total.....$

A True Copy.

Attest:

Deputy Clerk

Filed Aug. 31, 1989, Leonard Green, Clerk

No. 88-5761

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

O R D E R

TECHNOLOGY FOR ENERGY CORPORATION

Plaintiff - Appellant

v.

SCANDPOWER, A/S; SCANDPOWER, INC.;

Defendants

RADCAL ENGINEERING, INC.; FLUID COMPONENTS, INC.; ROBERT D. SMITH; JAMES P. WARING; MALCOLM M. McQUEEN; ROBERT A. DEANE

Defendants - Appellees

BEFORE: KENNEDY, JONES AND WELLFORD, Circuit Judges

Upon consideration of the petition for rehearing filed by the appellant, the court concludes that the issues raised therein were fully considered upon the original oral argument and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is DENIED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk